FILED
DEC 15 195
HAROLD B. WILLEY,

In The

Supreme Court of the United States

October Term, 1954

No. [redacted]489

Dr. Carroll K. Davis, *Appellant*

v.

Board of Regents of the University of the State of New York, *Appellee*

STATEMENT OF JURISDICTION

Appeal from the Court of Appeals of the State of New York

Isidore Levine
521 Fifth Avenue
New York

William J. Hughes, Jr.
James F. Reilly
821 15th Street, N. W.
Washington 5, D. C.
Counsel for Appellant

Wilson - Epes Printing Co. - RE 7-6003 - Washington 1, D. C.

POOR COPY

INDEX

PAGE

Opinion Below:

I Jurisdiction:
- A. This Court's Jurisdiction 2
- B. Pertinent Dates 2
- C. Statute Involved 2
- D. Nature of Proceeding 3
- E. Court Action 4
- F. Way in Which Constitutional Questions Were Raised 5

II Questions Presented 8

III A Substantial Federal Question Is Involved 8

Conclusion 11

Appendix

Opinion of the Supreme Court of New York 1

Opinion of the Appellate Division of New York 6

Memorandum Opinion of the Court of Appeals of New York 11

Order Denying Motion for Reargument 13

Statutes Involved

Section 1311(2), Education Law 10

Section 6514, Education Law 2, 3, 4

Section 6514(2)(d), Education Law 3, 7

Section 6613(3), Education Law 10

Sections 6 and 8, First Article, New York State Constitution

28 U. S. C. Section 1257(2) 2

28 U. S. C. Section 1257(3) 2, 7

28 U. S. C. Section 2103 2

PAGE

United States Constitution, First Amendment..... 7
United States Constitution, Fourteenth Amendment.... 7

Table of Cases

Barksy v. Board of Regents, 98 L. Ed. 545..... 7
Bender v. Board of Regents, 262 App. Div. 627..... 10
Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673..... 7, 9
Commercial Pictures Corp. v. Board of Regents of New York, 346 N. Y. 863..... 11
305 N. Y. 336..... 11
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290 8
Greenbaum v. Bingham, 201 N. Y. 343..... 10
In re Palmer, 275 App. Div. 5..... 10
Johnson v. Board of Dental Examiners, 134 F. 2nd. 9, 12 10
Kotteakos v. United States, 328 U. S. 750..... 10
Leasure v. State, 72 Okla. Crim. 162, 114 P. 2nd. 191 9
Lee Optical Co. v. Williamson, 120 F. S. 128, 139-142 11
Manhattan R. Co. v. Cohen, 243 U. S. 123, 134..... 7
People ex rel Kiebrick v. Roosevelt, 1 App. Div. 577 10
People v. Riley, 376 Ill. 364, 33 N. E. 2nd 872, 134 A. L. R. 1261, 1265..... 9
People v. Serrielle, 354 Ill. 182, 188 N. E. 375..... 9
Rex v. Harris, 41 Ont. L. Rep. 366, 40 D. L. R. 684.... 9
Rex v. Quinn, 23 Cr. App. Rep. 196 (CCA)..... 10
Saunders v. Shaw, 244 U. S. 317..... 7, 9
Semler v. Oregon State Board of Examiners, 294 U. S. 608..... 10
United States v. Benz, 282 U. S. 304, 307..... 9
United States v. Sansone, 206 F. 2nd. 86..... 10

POOR COPY

IN THE

Supreme Court of the United States

October Term, 1954

No. .....

DR. CARROLL K. DAVIS, *Appellant*

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, *Appellee*

Appeal from the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

OPINION BELOW

The opinion of the Supreme Court of the State of New York in Special Term will be found in the record at page 5; it is reprinted as part of the appendix hereto page 1. It is unreported. The opinion of the Appellate Division (reversing) is reported in *283 N. Y. App. Div. 591; 128 N. Y. S. 2nd. 881,* and is found in the record at page 70; it is reprinted in the appendix hereto at page 6.

The opinion of the Court of Appeals as reported in *121 N. E. 2nd. 619* will be found in the appendix hereto at pages 11, 12, 13.

I

JURISDICTION

A. This Court's Jurisdiction:

The jurisdiction of this Court is involved under *28 U. S. C. Section 1257(2)* on the ground there was drawn in question the validity of *Section 6514(2)(d)* of the *Education Law* of the State of New York, as construed and applied and the decision was in favor of its validity.

In the event this Court should determine the appeal does not lie, we ask the Court to treat the papers as an application for a writ of certiorari under *28 U. S. C. Section 2103* and the certiorari provisions of *28 U. S. C. Section 1257(3)*.

B. Pertinent Dates:

The memorandum of affirmance by the Court of Appeals of the State of New York was filed July 14, 1954 (R. 81, appendix herein, p. 13). The remittitur was issued July 14, 1954, (R. 78-81). Appellant's motion for reargument and amendment of the remittitur was denied without opinion October 7, 1954 (R. 82, App. p. 13). The notice of appeal was filed in the Supreme Court of the State of New York October 20, 1954 (R. 83-86).

C. Statute Involved:

Section 6514 of the Education Law of the State of New York *(16 McKinney's Consolidated Laws of New York Annotated, Part 3)* provides:

Section 6514(2)

"The license or registration of a practioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practioner

POOR COPY
BLEED THROUGH

reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

"(d) That a physician, osteopath or physiotherapist offered, undertook or agreed to treat disease by a secret method, procedure * * * or that he has advertised for patronage by means of handbills, posters, circulars, letters, stereopticon slides, motion pictures, radio or magazines."

D. Nature of Proceedings:

The Subcommittee of the Committee on Grievances, Department of Education of the State of New York, found Dr. Carroll K. Davis, appellant, guilty of having inserted certain magazine advertisements under the name of "Lincoln House Publishers" announcing that he was engaged in the practice of plastic surgery and that "fees for plastic surgery of nose, eyes, ears, face, neck and throat, etc., are reasonably low. Drop in for free consultation * * *." (R. 44). It recommended a suspension from practice for three months (R. 45). The full committee approved these findings and recommended similar suspension (R. 47-49); the Regents Committee (a higher body) concurred (R. 29-30). However, in its supplemental report, the Regents Committee referred to an alleged advertisement of the doctor in the classified telephone "Red Book" which appeared seven months *after* the hearing before the subcommittee. The committee stated such an advertisement was not prohibited by *Section 6514(2)(d) of the Education Law* (R. 39). However, the "Red Book" advertisement indicated, it said, that appellant did not take his experience before the Medical Committee on Grievances much to heart (R. 37). There the Committee considered that in addition to advertising itself, Dr. Davis fraudulently advertised that he was formerly of "Plastic Surgery Service." Appellant had had no oppor-

tunity to rebut these charges. It was obviously considered by the Regents Committee. In spite of this, the Regents Committee recommended to the full Board of Regents that the three-months' suspension be approved as this was the first case of this character in which discipline had been recommended. Another reason was that *Section 6514 of the New York Education Law* while prohibiting advertising in magazines, permits advertising in newspapers (R. 38). The full Board of Regents refused to follow the recommendations below as to the three-months' suspension; instead it increased the period of suspension to one year (R. 4, 27, 73-75). Appellant alleged below that this constituted a deprivation of due process in that the sentence was increased on the basis of additional charges he had no opportunity to meet (R. 18, 24).

E. Court Action:

Upon review in the Supreme Court of the State of New York holding a Special Term, the order of the Commissioner of Education suspending appellant from practice for one year (R. 27) was reversed and annulled (R. 12). The opinion of Judge Hamm held that the supplemental report of the Regents Committee on Discipline (R. 33), which first mentioned the "Red Book" advertising as to which appellant was not charged, was obviously prejudicial in that it had resulted in quadrupling the punishment recommended by the three lower boards from three months to one year (R. 10-11). On appeal by the Board of Regents the Appellate Division reversed (R. 69). It stated that the committee would have been wiser to have omitted this incident from its report but that it could not have influenced the Board of Regents because there never was any real issue as to appellant's guilt. The Court held there was nothing to indicate that this alleg-

POOR COPY

edly improper matter had any bearing upon the increase of the sentence. Furthermore, even if it did have a bearing, the Court held it was analogous to the regular practice of the Courts after guilt has been found to "receive extraneous information of all sorts from probation officers and others as to the prior and subsequent conduct of the defendant as bearing upon the extent of punishment. Administrative agencies cannot be denied similar latitude" (R. 75-76).

On appeal to the Court of Appeals, that Court affirmed *per curiam* and issued its remittitur July 14, 1954 (R. 78-81). A motion to reargue and to amend the remittitur was denied October 7, 1954 (R. 82), and the notice of appeal to bring the case here was filed October 20, 1954 (R. 83-86).

F. Way In Which Constitutional Questions Were Raised:

As already indicated, the Board of Regents increased Dr. Davis' punishment from a three-months' suspension to a year's suspension without giving him the opportunity to meet the charges of advertising in the telephone "Red Book." This advertisement was subsequent to the period covered by the charges (R. 9-10, 74); there was no proof of it. The Regents Committee simply took notice of it (R. 8, 9).

Dr. Davis' petition for review filed in the trial court alleged as follows:

> "Your petitioner has been advised and verily believes that the proceedings instituted against him were so conducted as to deprive him of his right to due process under the law, denied him substantial rights thereunder, were so prejudicially conducted as to render the proceedings wholly contrary to the law and to render same null and void." (R. 18)

Thereafter he refers to the "Red Book" advertisement (R. 22).

This unfairness was the basis of the State Court's reversal of the proceedings (R. 24), following appellant's contention that "it would be a denial of due process of law to conjecture that these charges played no part in the deliberations and recommendations of the Regents Committee" (R. 24). The Appellate Division differed and reversed (R. 72, 75), and the Court of Appeals affirmed *per curiam* without opinion. However the reporter synopsis; 121 NE (2) 619) stated:

> "The physician appealed to the Court of Appeals, contending that failure of the Board of Regents to comply strictly with mandatory provisions of subdivision 4 of section 6515 of the Education Law, Consol. Laws, c. 16, rendered the proceedings wholly void and deprived physician of due process of law, as guaranteed by state and federal Constitutions, by failing to give him due notice and full opportunity to be heard, and that gratuitous references by Regents' Committee on Discipline, in its supplemental report, to new matters not contained in charges leveled against physician in notice of hearing, and after receipt of testimony, were so prejudicial and violative of law and constitutional rights of physician as to require the annulling of all proceedings therein, and that subdivision 2(d) of section 6514 of the Education Law, insofar as it bans advertising for patronage, as such, without qualification or consideration of public welfare, is an abuse of the police power and hence is unconstitutional because violative of the First and Fourteenth Amendments to the federal Constitution and the Sixth and Eighth sections of the First Article of the state constitution."

The action of the Board of Regents in increasing the punishment on the basis of additional charges, which the doctor was given no opportunity to answer, constitutes a deprivation of due process analogous to that found by

this Court in *Saunders v. Shaw, 244 U. S. 317* and *Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673.* Such a deprivation seems properly reviewable by this Court by certiorari under *28 U. S. C. Section 1257(3).* However, because of doubt, an appeal was taken herein due to the fact that in the Court of Appeals the statute, *Section 6514, Subdivision 2(d) of the Education Law*, banning advertising by doctors, was specifically assailed on the grounds:

> (a) That it was unconstitutional on its face in that it disclosed no public interest or public policy.
> (b) On the ground that the statute deprived the doctor of the equal protection of the laws in that it singled out physicians for oppressive regulation but did not regulate at all various other medical practitioners.

The quotation above from the ruling of the Court of Appeals as reported in 121 N.E. (2nd) 619, shows that Court passed on the constitutionality of the Board's action in increasing the punishment on the basis of charges he had no opportunity to meet. It also shows the Court sustained the constitutionality of *Section 6514* of the *Education Law* as against appellant's claim that it violated the First and Fourteenth Amendments to the Constitution. The Court of Appeals by passing on these questions shows they were properly raised below so as to enable this Court to review *(Manhattan R. Co. v. Cohen, 234 U. S. 123, 134).* The validity of a suspension under *Section 6514* of the *Education Law* was presented to this Court on appeal in *Barsky v. Board of Regents 98 L. Ed. 545*; probable jurisdiction was noted (p. 551) and this Court went on to decide the appeal.

II

QUESTIONS PRESENTED

1. The Board of Regents of the Department of Education of New York increased Dr. Davis' suspension from practice from three months to a year for magazine advertising by taking into consideration advertising in the telephone "Red Book" which occurred seven months later, which latter charge he had no opportunity to meet, which was unproved and which was admittedly no offense under the statute (R. 39). Is *Section 6514 of the Education Law* of New York thus construed and applied unconstitutional as violative of the Due Process clause of the Fourteenth Amendment?

2. *Is Section 6514(2)(d) of the Education Law* of New York in violation of the First and Fourteenth Amendments in prohibiting entirely any advertising at all by medical doctors in magazines but permitting it in newspapers; in placing no restrictions at all in this field on practitioners of the healing arts other than doctors, osteopaths and physiotherapists? Are these sections so arbitrary and discriminatory as to be void? Do they deprive appellant of the equal protection of the laws?

III

A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

A. The Increase of Punishment Is Violative of Due Process:

On the first question it is the statute as construed and applied which is involved (*Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290*). After three lower boards

BLEED THROUGH POOR COPY

had heard the original advertising charges, the upper body (the Board of Regents) increased the punishment from three months' suspension to a year on the basis of charges of advertising in the telephone "Red Book." These charges the accused had no opportunity to meet; there was no proof of them in the record and it was admitted by the Board that the "Red Book" advertisement was no offense under the statute (R. 39). Procedurally the situation is analogous to that in *Saunders v. Shaw, 244 U. S. 317* and in *Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673*, wherein an upper court's unexpected action was violative of Due Process. The Supreme Court of New York in substance so held in the present case (R. 8-12). The Appellate Division reversed on the theory that the upper Board's consideration of outside data (the "Red Book" ad) was analogous to the practice of courts in sentencing offenders taking into consideration a probation report showing "subsequent misconduct" and other "extraneous information of all sorts" (R. 75-76). The Court of Appeals affirmed without opinion.

It is submitted no court or board can increase a sentence by taking into consideration a subsequent so-called offense of which the accused was not convicted, with which he has never been charged and which is admitted not to be an offense at all (R. 39). Inadmissible testimony requires the upper court or board to reduce rather than increase the punishment (cf. *Leasure v. State, 72 Okla. Crim. 162, 114 P. 2nd, 191; United States v. Benz, 282 U. S. 304, 307*). The right of a court or board in assessing punishment to hear additional testimony does not extend to the production of inadmissible or prejudicial testimony (*People v. Serrielle, 354 Ill. 182, 188 N. E. 375; People v. Riley, 376 Ill. 364, 33 N. E. 2nd, 872, 134 A. L. R. 1261, 1265*). In *Rex v. Harris, 41 Ont. L. Rep. 366, 40 D. L. R. 684*, the appellate court vacated a maxi-

mum sentence on a plea of guilty where the court took into consideration an offense for which the accused had not been tried (See also *Rex v. Quinn, 23 Cr. App. Rep. 196 - CCA*). Where the harm done cannot accurately be assessed, the accused must be deemed injured (*United States v. Sansone, 206 F. 2nd. 86*; cf. *Kotteakos v. United States 328 U. S. 750*).

Under New York law failure to advise the respondent of the charges against him vitiates the sentence or order (*Bender v. Board of Regents, 262 App. Div. 627; Greenbaum v. Bingham, 201 N. Y. 343*) and administrative officials cannot act on the basis of their own information (In re *Palmer 275 App. Div. 5; People ex rel Kiebrick v. Roosevelt, 1 App. Div. 577*).

B. The Prohibition Against Any Advertising At All in Magazines Is Arbitrary and Capricious:

The ban of *Section 6514(2)(d)* is absolute; it prohibits *all* advertising in magazines by doctors. Paradoxically it permits ads in newspapers or in the telephone "Red Book" which contains 21 pages of classified ads by doctors. *Section 1311(2)* of the *Education Law* up until 1949 banned newspaper ads by dentists (though allowing them to doctors) but did not proscribe dentists' ads in magazines. Now, by a 1949 amendment (*Section 6613(3), Education Law*), dentists' ads are banned in both magazines and newspapers though doctors' ads in newspapers are still permitted.

There is no rhyme or reason to such provisions. While this Court in *Semler v. Oregon State Board of Examiners, 294 U. S. 608* (see also *Johnson v. Board of Dental Examiners, 134 F. 2nd. 9, 12*) sustained a ban on "bait advertising" by dentists the present statute singles out magazine ads alone for proscription and this no matter what the ads contain. Such a statute was recently

POOR COPY

stricken down by a three-judge court in *Lee Optical Co. v. Williamson, 120 F. S. 128, 139-142*, Nos. 184 and 185 pending before this Court. In the *Semler* case this Court approved a state court holding that there was nothing wrong in advertising in itself; it was the abuse of such advertising that counted. The New York ban, however, is absolute and is obviously capricious with respect to the First and Fourteenth Amendments as having no rational relationship to public health.[1]

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

WILLIAM J. HUGHES, JR.
JAMES F. REILLY
821 15th Street, N. W.
Washington 5, D. C.
Counsel for Appellant

ISIDORE LEVINE, ESQ.
521 Fifth Avenue
New York City
Of Counsel

[1] See concurring opinion of Mr. Justice Black and Mr. Justice Douglas in *Commercial Pictures Corp. v. Board of Regents of New York, 346 U.S. 863*, as to coverage of the First Amendment; see also dissenting opinion of Mr. Justice Nye in the same case in *305 N. Y. 336, at p. 357-358*.

APPENDIX

APPENDIX

APPENDIX

Opinion of the Supreme Court of New York

(Caption Omitted)

HAMM, J.:

The petitioner is a physician. His medical license has been suspended for twelve months. He seeks the return of his license under Article 78 of the Civil Practice Act.

Section 1296 of Article 78 of the Civil Practice Act provides:

> "In a proceeding under this article, the questions involving the merits to be determined upon the hearing are the following only:
>
> * * *
> * * *
> * * *
>
> 4. Whether the authority conferred upon the respondent in relation to that subject matter has been pursued in the mode required by law in order to authorize him to make the determination.
>
> 5. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner.
>
> Where the determination under review was made as the result of a hearing held, and at which evidence was taken, pursuant to statutory direction, the following questions shall also be determined if the petitioner raises such questions:
>
> 6. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.
>
> 7. If there was such proof, whether, upon all the evidence there was such a preponderance of proof against the existence of any of those facts that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court triable by a jury, would be set aside by the court as against the weight of evidence.

> Where only one or more of the first five issues are raised, the court to which the application for relief is made shall itself dispose of the cause on the merits. Where one of the other two issues is raised, the court shall make an order directing that the proceedings be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding is instituted. The court may, however, even in such a case, itself pass on objections to the petition in point of law, and it shall dismiss the proceeding on the merits where it appears that the petitioner is not entitled to relief because of the provisions of section twelve hundred and eighty-five or section twelve hundred and eighty-six of this article."

The petitioner states that he raises no question under subdivisions 6 and 7 of Section 1296. He does not deny there was sufficient evidence to warrant the determination reached. He contends that there are "two errors of law", the first within the purview of subdivision 4 and the second within the purview of subdivision 5 of Section 1296, both of which subdivisions are quoted above.

Subdivision 4 of Section 6515 of the Education Law requires:

> "All such notices of hearing of charges shall contain a plain and concise statement of the material facts without unnecessary repetition, but not the evidence by which the charges are to be proved with a notification that a stenographic record of such proceedings will be kept, and that the accused will have opportunity to appear either personally or by counsel at the hearing, with the right to produce witnesses and evidence upon his own behalf, to cross-examine such witnesses, to examine such evidence as may be produced against him and to have subpoenas issued by the committee."

The notice of hearing given the petitioner states:

POOR COPY

"'You are further notified that such hearing will be given you in accordance with the statute in such cases made and provided and the rules adopted by the Department of Education and the Grievance Committee. A stenographic record of all proceedings will be made, and the witnesses will be sworn and examined at the time or time afore-mentioned. You may appear in person or with counsel and you may produce witnesses and evidence in your behalf, cross-examine witnesses and examine such evidence as may be produced against you'."

The notice followed the requirements of Subdivision 4 of Section 6515 of the Education Law except that it omitted to inform the petitioner as to his right to have subpoenas issued by the committee. The petitioner contends that as a matter of law the notice is so defective by reason of the omission that the authority conferred by the respondents "has not been pursued in the mode required by law in order to authorize" them "to make the determination." The petitioner was not represented by counsel at the hearing before the Subcommittee of the Medical Grievance Committee but his counsel was present as a "friend". It might be argued with some plausibility that the omission of notice of the right to have subpoenas issued is not sufficiently substantial to warrant a reversal of the determination.

But quite different is the rule of law which the petitioner alleges was violated after receipt of the testimony. It is required that a recommendation be made by the Subcommittee of the Medical Grievance Committee and by the Medical Grievance Committee (Subdivision 4 of Section 6515 of the Education Law) and also by the Regents Committee on Discipline (Subdivision 1 of Section 211 of the Education Law). The Subcommittee, the full Committee and the Regents Committee all recommended a suspension of three months. Thereafter the

Regents Committee on Discipline made a supplemental report in which appeared the following:

> "Before turning to discussion of the measure of discipline, we mention one further matter that cannot affect that question because it is not covered by the charges in these proceedings, and could be taken into account only if the proceedings were remanded to be re-heard on amended charges. We mention this matter, however, as a warning to Respondents for the future. There was produced before us an advertisement from the telephone 'Red Book', * * * 4 by 5 inches in size, illustrated with before-and-after pictures, published over the name of Respondent Crum (without mention of Respondent Davis), referring to Respondent Crum as 'formerly of Plastic Surgery Service', and giving the office address and telephone number of the office where Respondent Davis presently practices (but, as we have said, Respondent Crum does not). Since this issue of the 'Red Book' bears the notation 'Corrected to August 27, 1952,' and the hearing before the Medical Committee on Grievances was on January 30, 1952, it is apparent that the Respondents did not take their experience before the Medical Committee on Grievances much to heart. Respondent Davis stated at the hearing before us that there never had been such an organization as 'Plastic Surgery Service', referred to in the advertisement. That reference was obviously fraudulent, and the argument that other plastic surgeons have done similar things with impunity is obviously no excuse. Nor can there be any excuse for advertising in the name of Respondent Crum, who was not practicing, and thus obtaining patients for Respondent Davis through the resulting telephone calls and visits.
>
> We turn now to the question of the measure of discipline (leaving aside the matter discussed in the last paragraph, which is not properly before us for that purpose)."

The charges on which the petitioner was tried and which resulted in a recommendation of three months'

suspension by all three groups prior to the Regents themselves contained no reference to other advertising in the "Red Book" or use of the name "Plastic Surgery Service". No testimony in relation to either was produced before the Subcommittee of the Committee on Grievances; as a matter of fact such testimony would have been inadmissible. When it is considered that despite three prior recommendations of three months' suspension the Regents quadrupled the suspension recommended by imposing a suspension of twelve months, it cannot be said that the petitioner was not prejudiced by the reference at length to an exhibit which was not in evidence, which was mentioned only after the close of the testimony and after the rendition of three recommendations and the contents of which were entirely beyond the specifications contained in the charges. It is true that the supplemental report contains this parenthetical caution:

> "We turn now to the question of the measure of discipline (leaving aside the matter discussed in the last paragraph, which is not properly before us for that purpose)."

But in view of the result reached this admonitory statement cannot be said to have been effective in operating in any way in diminution of prejudice.

Subdivision 5 of Section 6515 of the Education Law provides:

> "Any licensed practioner found guilty under the provisions of this section, or whose license is otherwise revoked or suspended or registration annulled, or who has been refused registration, or who is otherwise reprimanded or disciplined under this article may institute a proceeding under article seventy-eight of the civil practice act for the purpose of reviewing such determination returnable before the appellate division of the third judicial department, but no such determination shall be stayed or en-

joined except upon application to such appellate division, after notice to the attorney general."

This subdivision is the same as subdivision 5 of former Section 125 of the Education Law with the exception of the substitution of "institute a proceeding under article seventy-eight of the civil practice act" for "have an order of certiorari". Obviously this substitution relates only to a proceeding brought under Subdivisions 6 or 7 of Secion 1296 of the Civil Practice Act and not to a proceeding brought under one or more of the first five subdivisions of Section 1296 (Cherry v. Board of Regents, 289 N. Y. 148; Matter of Garsson v. Wallin, 279 App. Div. 1111, aff'd 304 N. Y. 702).

The determination must be annulled.

Submit order on two days' notice.

Dated at Troy, New York, November 4, 1953.

• • • •

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION

Opinion of Appellate Division

Before: Hon. Sydney F. Foster, Presiding Justice.

Hon. Francis Bergan,
Hon. William H. Coon,
Hon. Philip Halpern,
Hon. Daniel F. Imrie,

Associate Justices.

Appeal from an order of the Supreme Court, Albany County (Hamm, J.), entered November 14, 1953, granting the petitioner's application and annulling the determination by the appellant suspending the petitioner's medical license for a period of one year.

Nathaniel L. Goldstein, Attorney General of the State of New York (Wendell P. Brown, Solicitor General and Henry S. Manley, Assistant Attorney General, of Counsel) Attorney for Appellant, the Capitol, Albany, New York.

Isidore Levine, Attorney for Petitioner-Respondent, 521 Fifth Avenue, New York 17, New York.

Halpern, J.

This is an appeal by the Board of Regents from an order of the Special Term annulling the Board's determination suspending the license of the petitioner-respondent to practice medicine for one year. The order of annullment was granted upon the ground that the Board's decision had been improperly influenced by matters outside the record brought to its attention by its Committee on Discipline.

We have come to the conclusion that the order of the Special Term must be reversed and the determination of the Board of Regents confirmed.

First of all, the Special Term should have transferred the case to the Appellate Division for review in the first instance, pursuant to the terms of subdivision 5 of Section 6515 of the Education Law. That subdivision specifically provides that a proceeding under Article 78 of the Civil Practice Act for the purpose of reviewing a determination revoking or suspending the license of a licensed practitioner shall be "returnable before the appellate division of the third judicial department."

The fact that the petitioner in this case raised only questions of law under subdivisions 4 and 5 of Section 1296 of the Civil Practice Act did not affect the duty of the Special Term to transfer the case to the Appellate Division. The specific provision of Section 6515 of the

Education Law is controlling as against the general provisions of Section 1296 of the Civil Practice Act.

As the Special Term pointed out, in dealing with the question of the duty to transfer the case, the petitioner did not raise any question as to the sufficiency of the evidence to warrant the finding by the Board that he was guilty of the misconduct charged. The petitioner raised only two procedural points, one that the notice of hearing did not specifically call attention to the fact that the petitioner had the right to have subpoenas issued by the Committee on his behalf in accordance with Section 6515 (4) of the Education Law, and the other that the Regents' Committee on Discipline had improperly mentioned evidence of subsequent misconduct on the part of the petitioner in its supplemental report to the Board of Regents.

The first point was correctly brushed aside by the Special Term as inconsequential. The notice of hearing did not mention the right to subpoena witnesses but it specifically stated that the petitioner had the right to produce witnesses and to cross-examine witnesses. While the petitioner's counsel insisted on being recorded merely as a friend, he was present throughout the hearing and he was unquestionably aware of the right to subpoena witnesses. There is nothing to indicate that any evidence that could have been produced on behalf of the petitioner was not produced because the notice did not specifically inform him that subpoenas could be issued on his behalf.

We believe that the second procedural point, upon the basis of which the Special Term was persuaded to annul the determination, is also without merit. The charges were that the petitioner, who was engaged in the practice of plastic surgery, had advertised for patronage in violation of Section 6514, subdivision 2(d), of the Education Law and that he was guilty of fraud and deceit

POOR COPY

in the practice of medicine in violation of Section 6514, subdivision 2(a), by reason of the fact that certain of the advertising was done under an assumed name. The initial hearing was held before a sub-committee of the Medical Grievance Committee. The petitioner admitted the principal charge, that of advertising for patronage in violation of the statute. His only plea was one in mitigation, that others were guilty of similar offenses. The sub-committee and the Medical Grievance Committee found that the charges had been sustained and recommended that the petitioner's license to practice medicine be suspended for three months. The case was thereafter referred to the Regents' Committee on Discipline and on oral argument was had before that Committee. After hearing the petitioner, the Regents' Committee on Disciplin sustained the findings made by the Medical Grievance Committee and concurred in its recommendation that the petitioner's license be suspended for a period of three months.

The Board of Regents was apparently not satisfied with the extent of the punishment recommended and it sent the case back to the Regents' Committee on Discipline for a supplemental report. The Regents' Committee submitted a supplemental report, reviewing the case in greater detail and arguing that "while the recommended three months' period of license suspension may well have appeared to the Board of Regents to be too short", a longer period of suspension should not be imposed because this was the first case in a campaign directed against what was a rather widespread practice. It was in the course of the supplemental report that the Regents' Committee on Discipline referred to an objectionable advertisement by the petitioner in the telephone "Red Book" subsequent to the period covered by the charges. The Committee stated that it mentioned the matter in its report solely "as a warning to respondents

(the petitioner and one other) for the future" and that the matter "cannot affect that question" (the measure of discipline) "because it is not covered by the charges in these proceedings." The purpose of the Regents' Committee on Discipline in mentioning the matter at all is obscure; perhaps, the Committee thought that mentioning it in its formal report would make more effective the oral warning which it had given the petitioner against any recurrence of misconduct in the future. As the Committee itself recognized, it had no bearing upon the subject matter of the supplemental report; it would have been wiser if the Committee had chosen some other way to formalize its warning.

In any event, the mention of this matter in the supplemental report is not an adequate ground for invalidating the entire proceeding. Obviously, it did not influence the decision by the Board of Regents as to the petitioner's guilt of the principal offense originally charged. It could not have influenced its decision on that subject because there never was any real issue as to his guilt. It clearly appears that the decision to accept the findings of the Medical Grievance Committee and of the Regents' Committee on Discipline as to the petitioner's guilt had already been taken when the supplemental report was asked for, and that the only remaining question was the extent of the punishment.

The Board of Regents subsequently decided to impose a period of one year's suspension, but there is nothing to indicate that the allegedly improper matter in the Committee's report, had any bearing upon the Board's decision. The Board of Regents apparently had the longer period in mind at the time when it asked the Committee for a supplemental report. The Committee stuck to its guns but it was apparently unable to persuade the Board to alter its intention.

BLEED THROUGH POOR COPY

Furthermore, even if we assume that the Board's determination as to the measure of punishment was influenced by the reference to the petitioner's subsequent misconduct, this was not improper. It is the regular practice of the courts, after a determination of guilt has been made, to receive extraneous information of all sorts from probation officers and others as to the prior and subsequent conduct of the defendant as bearing upon the extent of punishment. Adminstrative agencies cannot be denied similar latitude.

Finally, even if we assume that it was improper to consider the subsequent misconduct of the petitioner in determining the extent of the punishment, the courts have no power to interfere. The action of the Board in determining the extent of the punishment is wholly discretionary. Neither the result not the considerations upon which it was based, can be reviewed by the courts (Matter of Barsky v. Board of Regents, 305 N. Y. 89, 99).

The order appealed from is reversed and the determination of the Board of Regents is confirmed, with $50.00 costs.

The Court of Appeals of New York affirmed without opinion (R. 81). However, the National Reporter System at 121 N. E. 2nd. 619, reported the proceedings as follows:

121 N.E. 2d 619

Carroll K. Davis, Appellant

v.

The Board of Regents of the University of the State of New York, Respondent.

Court of Appeals of New York

July 14, 1954

Appeal from Supreme Court, Appellate Division, Third Department, 283 App. Div. 591, 128 N.Y.S. 2d 881.

Proceeding in the matter of the application of physician for an order of certiorari pursuant to the Civil Practice Act, Sec. 1283 et seq., against the Board of Regents of the State of New York to review a determination of the Board of Regents suspending physician's license to practice medicine for one year.

The Supreme Court, Special Term, Albany County, Herbert D. Hamm, J., entered order granting application of physician and annulling determination of the Board of Regents, and the Board of Regents appealed.

The Appellate Division, Halpern, J., reversed the order, confirmed the determination of the Board of Regents, and held that entire proceeding would not be invalidated because supplemental report of Regents' Committee on Discipline referred to subsequent alleged misconduct of physician not covered by the charges.

The physician appealed to the Court of Appeals, contending that failure of the Board of Regents to comply strictly with mandatory provisions of subdivision 4 of section 6515 of the Education Law, Consol. Laws, c. 16, rendered the proceedings wholly void and deprived physician of due process of law as guaranteed by state and federal Constitutions, by failing to give him due notice and full opportunity to be heard, and that gratuitous references by Regents' Committee on Discipline, in its supplemental report, to new matters not contained in charges leveled against physician in notice of hearing, and after receipt of testimony, were so prejudicial and violative of law and constitutional rights of physician as to require the annuling of all proceedings therein, and that subdivision 2(d) of section 6514 of the Education Law, insofar as it bans advertising for patronage, as such, without qualification or consideration of public welfare, is an abuse of the police power and hence is unconstitutional because violative of the First and Four-

POOR COPY

teenth Amendments to the federal Constitution and the Sixth and Eighth sections of the First Article of the state Constitution.

Isidore Levine, New York City (Emanuel Greenberg, Allen H. Suffern, and George Shapiro, New York City, on the brief), for petitioner-appellant.

Nathaniel L. Goldstein, Atty. Gen. (Wendell P. Brown, Solicitor Gen. Leonardsville, and Henry S. Manley, Asst. Atty. Gen. of Counsel), for respondent.

Order affirmed. All concur.

STATE OF NEW YORK,

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day of October A.D. 1954.

PRESENT, HON. EDMUND H. LEWIS,

Chief Judge, Presiding.

Mo. No. 384

In the Matter of the
Application of Dr. Carroll K. Davis, Appellant,
for an order &c.,

vs.

The Board of Regents of the University of
the State of New York, Respondent.

A motion for reargument, to amend the remittitur and for a stay in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

(SEAL) A Copy

Gearon Kimball
Deputy Clerk.

LE COPY

FILED
JAN 3 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. 489

DR. CARROLL K. DAVIS,

Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

JACOB K. JAVITS
Attorney General of the State
of New York
Attorney for the Appellee

HENRY S. MANLEY
Acting Solicitor General
The Capitol
Albany, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

IN THE

Supreme Court of the United States

October Term, 1954

No. 489

DR. CARROLL K. DAVIS,

Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

The undersigned, on behalf of the Appellee, hereby acknowledges receipt of the Statement of Jurisdiction filed herein, and moves that the appeal be dismissed or the judgment below affirmed, or, if the Appellant's papers are to be considered as an application for certiorari, that such application be denied.

In support of such motion, the undersigned asserts the following reasons:

This litigation was commenced by a Petition verified August 21, 1953, which appears in the record. The only suggestion that any constitutional issue was presented or

might be presented was paragraph 8 of the Petition, as follows:

> "Your petitioner has been advised and verily believes that the proceedings instituted against him were so conducted as to deprive him of his right to due process under the law, denied him substantial rights thereunder, were so prejudicially conducted as to render the proceedings wholly contrary to the law and to render same null and void." (R. 18)

Thereafter the Petition alleged some "legal errors", but it nowhere contained reference to constitutional grievances except as quoted, which is not a specific reference either as to facts or as to what constitution is invoked.

The unreported opinion by Mr. Justice Hamm (R. 5-12) makes no reference to any constitutional question. Neither does the opinion of the Appellate Division (R. 70-76, officially reported at 283 App. Div. 591). Neither does the memorandum of affirmance by the Court of Appeals (officially reported at 307 N. Y. 786 mem.).

Subsequently, the Court of Appeals declined to amend its remittitur. *Matter of Davis* v. *Regents*, 307 N. Y. 833 mem. The show-cause order then before the Court of Appeals showed that the application was for:

> "Amending the remittitur in the above entitled action to state the grounds of the decision of this Court in order to remove uncertainty, avoid litigation and make it appear to the Supreme Court of the United States upon application for a writ of certiorari whether or not a Federal question was necessarily decided * * *."

The decisions of the State courts are final against the Appellant as to any alleged "legal errors", including violations of the due process and equal protection provisions of the State Constitution, if indeed any such questions were ever deemed to be involved.

As to the possible involvement of any Federal question or any question about violation of the Constitution of the United States, it is respectfully submitted that no such question ever was presented and that no substantial question of that nature is now suggested on behalf of the Appellant.

Albany, January 1, 1955.

Jacob K. Javits
Attorney General of the State
of New York
Attorney for the Appellee

Henry S. Manley
Acting Solicitor General
The Capitol
Albany, N. Y.

No. 489. DAVIS *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK. Appeal from the Supreme Court of New York, Albany County. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *William J. Hughes, Jr.* and *James F. Reilly* for appellant. *Jacob K. Javits*, Attorney General of New York, and *Henry S. Manley*, Acting Solicitor General, for appellee. Reported below: 307 N. Y. 786, 121 N. E. 2d 619.